Supreme Court, U.S.
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No. 05-782

In The

Supreme Court of the United States

NEBRASKA PUBLIC POWER DISTRICT,

Cross-Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the United States Fish and Wildlife Service exclude past and present impacts of Missouri River dam operations from the "environmental baseline" for purposes of interagency consultation under the Endangered Species Act, where 50 C.F.R. § 402.02 reads in material part: "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other activities in the action area. . . ."

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were, in addition to the Nebraska Public Power District: American Rivers; Environmental Defense; National Wildlife Federation; Iowa Wildlife Federation; Kansas Wildlife Federation; Montana Wildlife Federation; Nebraska Wildlife Federation; North Dakota Wildlife Federation; South Dakota Wildlife Federation; Izaak Walton League of America; the United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; the United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of the Interior; the States of Nebraska and Missouri and Missouri River Energy Services.

This case is part of multidistrict litigation designated as *In re Operation of the Missouri River System Litigation*. *See* 277 F. Supp. 2d 1378 (J.P.M.L. 2003). Parties to the multidistrict litigation included additionally: The States of North Dakota and South Dakota; the Mandan, Hidatsa and Arikara Nation; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Blaske Marine, Inc.; Conocophillips Company; Koch Materials Company; Jebro, Inc.; Coalition to Protect the Missouri River; Memco Barge Line, Inc.; Midwest Area River Coalition 2000, Missouri River Technical Group, and Tosco, a subsidiary of Phillips 66 Company.

CORPORATE DISCLOSURE

The Nebraska Public Power District is a public power district and political subdivision organized under the laws of the State of Nebraska and is not a "non-governmental corporation" for purposes of Rule . . 6.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.5, the Nebraska Public Power District ("NPPD") cross-petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This cross-petition pertains to *Environmental Defense, et al. v. U.S. Army Corps of Engineers, et al.*, Docket No. 05-631.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 421 F.3d 618 (8th Cir. 2005). No rehearing of that opinion was sought by any party to this litigation. The opinion of the district court is reported at 363 F. Supp. 2d 1145 (D. Minn. 2004).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 16, 2005. This Court has jurisdiction over NPPD's cross-petition under Rule 12.5. The Petition for Writ of Certiorari in Docket No. 05-631 was docketed November 16, 2005. The Court has jurisdiction over the original Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

REGULATION AT ISSUE

The regulation at issue is located at 50 C.F.R. § 402.02, which contains a series of definitions applicable to interagency consultations under Section 7(a)(2) of the

Endangered Species Act, 16 U.S.C. § 1536(a)(2). The term "environmental baseline" is located within the definition of "Effects of the Action," which reads as follows:

> "Effects of the Action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

STATEMENT OF THE CASE

I. CONTROL AND DEVELOPMENT OF THE MISSOURI RIVER.

In 1944, Congress explained: "The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed." S. Doc. No. 191, 78th Cong., 2nd Sess. (1944) at 10. To control and develop the River, Congress

enacted the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), authorizing the construction and operation of dams and reservoirs on the main stem of the Missouri River. Congress made flood control and navigation the "dominant function" for which the Secretary of War was to manage the reservoirs through the United States Army Corps of Engineers ("Corps"). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 815 (1984); *see also South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-20 (8th Cir. 2003), cert. denied, *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S.Ct. 2015 (2004). In addition, the main stem dam and reservoir system provides a wide range of benefits to each of the Missouri River Basin states. Secondary project purposes include water supply, power generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247, 78th Cong., 2nd Sess. (1944) at 3; *Ubbelohde*, 330 F.3d at 1020.

As this Court explained in *ETSI*, the Flood Control Act embodies a compromise between two plans envisioned by the Secretary of the Army on the one hand, and the Secretary of the Interior on the other. H. DOC. NO. 475, 78th Cong., 2nd Sess. (1944) ("Pick Plan"); S. DOC. NO. 191, *supra* ("Sloan Plan"); S. DOC. NO. 247, *supra* (reconciling Pick and Sloan). The plans explain what was at stake when they were developed. The Pick Plan notes: "Flood control and the conservation of water resources are urgently needed in the Missouri River basin. The water that now produces floods should be stored and put to beneficial use in the interest of navigation, power development, irrigation, and other useful purposes." H. DOC. NO. 475 at 17. The Sloan Plan explains that "[u]ntil 1940, practically none of its waters were being so used. As an economic or

social resource, the Missouri has been a menace rather than a valuable asset." S. DOC. NO. 191 at 96.

The committee report reconciling the two plans explains the role of the Missouri River dam and reservoir system:

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

S. DOC. NO. 247 at 3-4. The Sloan Plan similarly states, with regard to the reservoirs at issue:

> This basin-wide plan provides for a number of reservoirs on the upper reaches of the Missouri River and its tributaries, for the purposes of storing water, and releasing it during periods of low flow. Such reservoirs will contribute to flood control not only on the lower river but at all points from the mouth of the river to the reservoir sites; they will aid navigation on the lower river by reducing flood damages to navigation works and by increasing the dry-season flow; they will enlarge the supply of water available for irrigation; and they will make practicable the generation of electrical energy at many places.

S. DOC. NO. 191 at 17-18. The Pick-Sloan architects recognized "[a]ll these reservoirs will serve one fundamental purpose, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow." S. DOC. NO. 191 at 21.

As the Court of Appeals recognized, the operations most destructive to the Missouri River species are the very operations Congress required the Corps to undertake in the Flood Control Act:

> The Corps' operation of the reservoir system, generally capturing water in the upstream reservoirs to eliminate spring flooding and releasing water throughout the summer and fall as necessary to enable downstream navigation and restore reservoir capacity for the following spring, eliminated the spring rise and summer low flow from the hydrograph.

In re Operation of the Missouri River System Litigation, 421 F.3d 618, 626 (8th Cir. 2005). The Federal litigants below explained why this was problematic for the Missouri River species:

> The Corps' operations, moreover, nearly eliminated the spring floods that had historically caused the free-flowing Missouri River to overflow its banks and inundate adjacent land.
>
> . . . By preventing spring floods, for example, [the United States Fish and Wildlife Service] found that the Corps also reduced the natural processes that create and scour barren sandbar islands used by the tern and the plover for nesting. . . .
>
> And by maintaining and increasing flows over the dry summer months to sustain navigation and other downstream river uses, the Corps sometimes flooded tern and plover nests. . . . Higher summer flows also reduced the amount of the slow-moving water habitat that young pallid sturgeon need. . . .

Federal Appellees' Brief at 15-16 (citations omitted).

This, of course, would not have shocked the Congress that approved the Pick-Sloan compromise, which was informed of its impact to river ecology. The Sloan Plan, for example, contains a report submitted by the United States Fish and Wildlife Service ("FWS") explaining: "The reservoirs and diversions will change most drastically the present flow of the river. It is obvious that these physical changes will affect the aquatic life of the river. . . ." S. DOC. NO. 191 at 210.

II. SUMMARY OF MATERIAL FACTS AND LITIGATION BELOW.

A. The *American Rivers* Litigation.

Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). An agency proposing to take action can satisfy this substantive mandate by consulting with FWS, or NOAA Fisheries in the case of marine and anadromous species, in accordance with those agencies' joint regulations at 50 C.F.R. Part 402 (Interagency Cooperation). *See, also Interagency Cooperation - Endangered Species Act of 1973; Final Rule*, 51 Fed. Reg. 19,926 (June 3, 1986). The result of formal consultation under ESA Section 7(a)(2) is a biological opinion issued by the appropriate wildlife agency explaining whether the proposed action will "jeopardize" a listed species or destroy or adversely modify such a species' critical habitat. *See, e.g., Bennet v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997).

In issuing a biological opinion, FWS assesses the degree of impact a proposed action will have on species

listed and protected under the ESA. 51 Fed. Reg. at 19,932. This measurement involves "consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat." *Id.* The difference is attributable to the proposed action. The "present environment" is the environmental baseline, which represents:

> [T]he effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area. The environmental baseline is a 'snapshot' of a species' health at a specified point in time. It does not include the effects of the action under review in the consultation.

UNITED STATES FISH AND WILDLIFE SERVICE, *Final ESA Section 7 Consultation Handbook* (March 1998) at 4-22.

In November 2000, FWS issued a biological opinion concluding that the Corps' operations under the 1979 Master Manual[1] would violate the ESA by jeopardizing ESA-listed species (the least tern, piping plover and pallid

[1] By way of background, the Corps adopted regulations in accordance with Section 7 of the Flood Control Act, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects, and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Main Stem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960. The Corps revised the Master Manual in 1975, 1979 and most recently in 2004. The Master Manual presents the regulatory framework by which the Corps attempts to achieve the multiple purposes for which the dam and reservoir system was created.

sturgeon) or adversely modifying designated critical habitat for the tern and plover (the "2000 BiOp"). On February 13, 2003, Environmental Defense and National Wildlife Federation, then led by American Rivers, sought and obtained an injunction from the United States District Court for the District of Columbia requiring the Corps to comply with the 2000 BiOp and its "reasonable and prudent alternative." *American Rivers v. U.S. Army Corps of Engr's*, 271 F. Supp. 2d 230 (D.D.C. 2003). The court had jurisdiction over those claims under 28 U.S.C. § 1331.

American Rivers was filed at a time when multiple other cases were pending regarding the Corps' Missouri River operations. *See In re Operation of the Missouri River System Litigation*, 421 F.3d at 626-27. The case was transferred to the United States District Court for the District of Minnesota to be heard with the other cases. *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). NPPD then intervened in *American Rivers* and moved for summary judgment declaring the 2000 BiOp unlawful and vacating and setting aside that document. The district court had jurisdiction over NPPD's claims under 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 5 U.S.C. § 702. Before NPPD's motion could be decided, FWS amended its biological opinion and issued a revised version on December 16, 2003 (the "Amended BiOp"). NPPD again moved for summary judgment declaring the Amended BiOp unlawful. In both cases, NPPD argued, in part that FWS had employed an unlawful environmental baseline to measure the impacts of the Corps' dam operations. The Court of Appeals (in a series of consolidated appeals) upheld FWS' formulation of the environmental baseline. *In re Operation of the Missouri System Litigation*, 421 F.3d at 632-33. The Court of

Appeals unfortunately conflated NPPD's environmental baseline claim with a separate and independent claim concerning the non-discretionary nature of Corps reservoir operations. *Id.* The court rejected NPPD's claim because the court concluded that the Corps has "a good deal of discretion" over how it manages the Missouri River reservoirs. *Id.* at 633. As NPPD explained to the Court of Appeals, however, FWS' environmental baseline was unlawful "even assuming Congress vested the Corps with absolute discretion. . . ." Plaintiff-Appellant Nebraska Public Power District's Reply Brief at 17 (filed in Cause No. 04-2785 below).

B. The Fish and Wildlife Service's Fabrication of a Hypothetical, "Run-of-the-River" Baseline.

The agencies' consultation efforts leading up to the 2000 BiOp spanned many years. The consultation was marked by disagreement between the consulting agencies regarding the Corps' proposed action and the manner in which it would be analyzed. J.A. 02871-72; J.A. 02889; J.A. 02893; J.A. 02905-06; J.A. 01242-46.[2] The Corps explained that their biological assessment[3] "[would] utilize the current operation of the main stem system as a baseline, since the current operation is the activity that was occurring when the pallid sturgeon was listed." J.A. 02893. The Corps reasoned that the appropriate baseline, i.e., the *status quo*, was operation under the 1979 Master Manual. J.A. 02871-72; J.A. 02893. FWS rejected this approach

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[2] "J.A." refers to the joint appendix filed by the parties in the Court of Appeals below.

[3] A biological assessment is a document used to initiate formal consultation under Section 7 of the ESA. *See* 50 C.F.R. § 402.12.

because it did not "acknowledge past and ongoing degradation of the Missouri River ecosystem." J.A. 02889.

When determining the effects of the Corps' proposed action, FWS began with an "environmental baseline" that represented pre-operation conditions and assumed that the main stem dams were inoperative. J.A. 10045. FWS explained that its baseline would be "passive management (run-of-the-river) condition reflecting 'dams in place, reservoirs full, inflow = outflow.'" J.A. 02874; J.A. 02072-73; J.A. 02107. FWS reasoned that the "incremental effects of continued/modified operations cannot be isolated unless the river system is examined hypothetically without project operations.") J.A. 02365. FWS further rationalized: "In most consultations, FWS typically evaluates projects that have not been constructed or implemented. However, in this consultation, FWS is evaluating the effects of projects that have already been implemented and, thus effects that are already occurring." J.A. 10044.[4] This was consistent with FWS' long-held position that only by fabricating an imaginary baseline could FWS address the past deleterious effects of dam operations to the listed

[4] Again, it is undisputed that the dams themselves, as well as the Corps' operation of the dams under the 1979 Master Manual caused the adverse effects at issue here. FWS explained that "the *primary cause* of declines in reproduction, growth, and survival of [the] pallid sturgeon" were the construction and operation of the main stem dams. J.A. 06793-94 (emphasis supplied). As FWS acknowledged in the 2000 BiOp, the Missouri River ecosystem was dramatically changed "solely" by the construction of the Missouri River dams. J.A. 03624, 09986. It is the Corps' historic operation of the dams that has resulted in suppressed spring flows and increased (over pre-development) flows in the summer. J.A. 09988. It is those historic Corps' activities, previously directed by Congress, that have reversed the normal flow pattern. *Id. See also* J.A. 09989. These are "past and present impacts" of Corps operations.

species. J.A. 02874; J.A. 02889. Ultimately, in developing its 2000 BiOp FWS rejected the Corps' approach and utilized the baseline FWS preferred. J.A. 03264; J.A. 09989-90; J.A. 10044. That baseline was carried forward in the Amended BiOp. J.A. 06736.

The Federal Appellees admit that when developing the environmental baseline in this case, "[t]he Service did not assume any flow restrictions artificially imposed by the dams." Federal Appellees' Brief at 110, n.11; *see also* J.A. 02874 ("the environmental baseline for the consultation on the proposed Master Manual revision does not include . . . impacts of the Corps' ongoing operations directed by the existing Master Manual."). Thus, FWS' baseline was formulated "without the impacts of the current operations of the Missouri River dams operated by the Corps. . . ." J.A. 02874; *see also* J.A. 10045.

FWS described this as a "simplistic approach" that equated the effects of the environmental baseline with the effects of the proposed action. J.A. 10044 (explaining FWS accepts "an assumption that the environmental conditions that would result from continued operations of the system will be at the same 'level' as the current environmental baseline."). The practical effect of that "simplistic approach" was to attribute to the Corps' proposed action all of the adverse impacts to the species that occurred on the system between 1937 (when the first dam closed) and 2000 (the date of the original biological opinion). FWS' attribution of "past and present" adverse effects (i.e., the baseline conditions) to the proposed action destroyed any distinction between the "environmental baseline" and the proposed action. *Id.* (identifying "future with project" as existing operations).

As the Corps recognized, FWS could have used a baseline of existing operations. *See* J.A. 02889 ("The Corps' *(sic)* has taken the position that the baseline for ESA and NEPA analyses is the current water control plan."). Had FWS done so, NPPD submits that the Section 7 consultations at issue here, particularly that resulting in the Amended BiOp, would have produced a *no jeopardy* biological opinion because the Corps' proposed action was designed specifically to benefit the threatened and endangered species at issue. *See, e.g.*, J.A. 06103-06229 (November 2003 biological assessment explaining the Corps' proposed operations to benefit the listed species). *Compare* J.A. 02908 ("[T]he Service is concerned that if the Corps determines that a change in operations or the Master Manual from the Corps' baseline (i.e., current operations) is beneficial (*this scenario is likely*), the Corps might conclude no adverse affect and that formal consultation is not warranted.") (emphasis supplied). FWS, however, treated the environmental baseline and the proposed action as one and the same, effectively ensuring a jeopardy opinion.[5]

[5] While reserving argument on the merits, if certiorari were granted, NPPD would explain – among other things – that this results in retroactive application of the ESA to pre-existing (i.e., baseline) activities in the manner rejected by the majority opinion in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279 (1978) ("Mr. Justice POWELL characterizes the result reached here as giving "retroactive" effect to the Endangered Species Act of 1973. We cannot accept that contention."). 437 U.S. at 187, 98 S.Ct. at 2298, n.32 (emphasis supplied) (responding to Justice Powell's concern that retroactive application of the ESA constitutes a "continuing threat to the operation of every federal project, no matter how important to the Nation." 437 U.S. at 210, 98 S.Ct. at 2310).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The Rule illuminates the "character of the reasons" a petition might be granted. Those reasons include a case where the Court of Appeals below has determined an important Federal question for the first time. *Id.* NPPD respectfully submits that its Conditional Cross-Petition for Writ of Certiorari implicates an important Federal question decided by a Circuit Court of Appeals for the first time below and that certiorari is warranted for that reason. Certiorari is particularly appropriate because the Federal wildlife agencies charged with administering the ESA (FWS and NOAA Fisheries) do not agree on how the environmental baseline should be formulated and are administering Section 7 of the ESA inconsistently.

I. THE COURT OF APPEALS' DECISION DETERMINES AN IMPORTANT FEDERAL QUESTION FOR THE FIRST TIME.

This case "concern[s] the construction of a major federal statute" that significantly affects the manner in which that statute is administered. *United States v. Donovan*, 429 U.S. 413, 422, 97 S.Ct. 658, 665 (1977). *Compare United States v. Ruzicka*, 329 U.S. 287, 288, 67 S.Ct. 207, 207 (1946). The ESA has become one of the most pervasive laws in America. "Section 7 and the requirements of [50 C.F.R. Part 402] apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03 (Applicability). The term "action" has been defined to include "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies in the United States or upon the high

seas." 50 C.F.R. § 402.02 (definition of "Action"). Section 7 consultations occur throughout the nation on everything from dam and reservoir operations (as here) to the issuance of flood insurance by the Federal Emergency Management Agency. *See, e.g., Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281 (S.D. Fla. 2005) (enjoining the issuance of flood insurance).

To provide a sense of the magnitude of Section 7's impact: The General Accounting Office previously found that approximately 18,211 Section 7 consultations were conducted in the four years between 1987 and 1991. General Accounting Office, *Endangered Species Act, Types and Number of Actions* (May 1992). At that time, approximately 600 domestic species were listed as threatened or endangered. *Id.* at 2. There are now little more than twice that many (1,278) domestic species listed in the United States. 50 C.F.R. § 17.11. However, there has been an inordinate increase in the number of Section 7 consultations undertaken by Federal agencies. According to FWS, "from 1998-2002 the Service conducted over **300,000** informal and formal Section 7 consultations." United States Fish and Wildlife Service, *Consultations with Federal Agencies*, reproduced at http://www.fws.gov/endangered/consultations/consultations.pdf (visited December 8, 2005) (emphasis supplied). Nearly every Federal agency is obligated to consult on one or more of its activities. Each and every such consultation begins with identification of the "environmental baseline" as defined in 50 C.F.R. § 402.02.

The decision below will have an important impact on the nation's public resources, an independent ground for certiorari. *See, e.g., United States v. Coleman*, 390 U.S. 599, 601, 88 S.Ct. 1327, 1330 (1968) ("We granted the

Government's petition for certiorari because of the importance of the decision to the utilization of the public lands. 389 U.S. 970, 88 S.Ct. 476"); *see also Andrus v. Utah*, 446 U.S. 500, 506, 100 S.Ct. 1803, 1806 (1980) (granting certiorari to resolve "a significant issue regarding the disposition of vast amounts of public lands."). The Missouri River Basin "extends over 530,000 square miles and covers approximately one-sixth of the continental United States." NATIONAL ACADEMY PRESS, *The Missouri River Ecosystem: Exploring The Prospects For Recovery* (2002) at 11 (J.A. 05027-120) (NAS' "*Missouri River Rpt.*"). The Missouri River runs 2,321 miles through Montana, North and South Dakota, Nebraska, Iowa, Kansas and Missouri until it joins the Mississippi at St. Louis. The middle states of this Country are reliant on its flows, as well as the water stored in its reservoirs. "[T]he major benefits of Pick-Sloan come from hydropower, water supply, and flood-damage reduction, each of which has annual benefits measured in hundreds of millions of dollars." *Missouri River Rpt.* at 89.

This issue is not limited to the Missouri River Basin, however. Section 7 of the ESA applies to most operations of the Corps and the United States Bureau of Reclamation ("Bureau") on the nation's major river systems. The impact of the ESA has been felt most dramatically in recent years on the Columbia, Rio Grande, Klamath and now Missouri Rivers. *See, e.g., National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1398223 (D. Or., Jun 10, 2005) (unreported), affirmed in part, remanded in part by *National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 418 F.3d 971 (9th Cir. 2005), amended and superseded by 422 F.3d 782; *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), vacated by 355 F.3d 1215 (10th Cir.

2004) (addressing Bureau of Reclamation's delivery of water under water supply contracts); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000).

These river systems are, themselves, a public resource providing benefits to the entire country. *See, e.g., Missouri River Rpt.* at 97 ("[O]f all the project purposes that justify the Missouri River system, hydropower provides the largest national economic benefit, with an annualized value that was no less than $615 million. . . ."); NATIONAL ACADEMY PRESS, *Managing the Columbia River: Instream Flows, Water Withdrawals, and Salmon Survival* (2004) (NAS' "*Columbia River Rpt.*") at 37 (Federal Columbia River Power System "has a generating capacity of roughly 33,000 megawatts (NPCC, 2004) and provides about 60 percent of the region's hydroelectricity generating capacity. (FCRCPS 2001). This system provides the Pacific Northwest with the lowest power rates in the nation. . . .").[6]

The Federal stewards of these great resources – the Corps and the Bureau – are altering their operations throughout the Country to meet the needs of threatened and endangered species based on those operations' impacts as measured against an environmental baseline. Enormous amounts of money are at stake. *See, e.g.*, GENERAL ACCOUNTING OFFICE, *Columbia River Basin Salmon and*

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[6] The populations of these great river basins are directly affected by the manner in which the ESA is implemented within them. *Compare Patterson v. Lamb*, 329 U.S. 539, 67 S.Ct. 448 (1947) (granting certiorari where thousands of draftees affected by decision below). Approximately 5,000,000 people reside in the Columbia River Basin. *Columbia River Rpt.* at 40; There are more than twice that many people (approximately 12,000,000) residing in the Missouri River Basin. J.A. 08493 (Master Manual at III-17 (¶ 3-09)).

Steelhead; Federal Agencies' Recovery Responsibilities, Expenditures and Actions (July 2002) at 46 (explaining that eleven Federal agencies in the Pacific Northwest estimated having spent $1.8 billion in federal funds and ratepayer revenues between 1982-1996 to recover salmon and steelhead, along with another $1.5 billion from 1997-2001). *Compare United States v. Zazove*, 334 U.S. 602, 614, 68 S.Ct. 1284, 1289 n.17 (1948).

Certiorari is particularly appropriate where, as here, the fiscal interests of the states are involved. *Alaska v. American Can Co.*, 358 U.S. 224, 225, 79 S.Ct. 274, 275 (1959) (granting certiorari "in view of the fiscal importance of the question to Alaska."). Nebraska receives more water supply benefits than any other State from Corps operations on the Missouri River. *Missouri River Rpt.* at 90. As noted, in 1994, the Corps found $571.6 million in annual benefits (i.e., cost savings) from the withdrawal of water from the Missouri River. *Id.* at 93. Of the total water supply benefits accruing to the Basin, Nebraska receives 44.8%, or approximately $256 million annually in 1994 dollars. *Id.* at 94. Of the $615 million in hydropower benefits, Nebraska receives 27.3%, or approximately $168 million. *Id.* at 97. To the extent the ESA is misapplied, those benefits are improperly compromised.

Given the extraordinary impact of the ESA, and the fundamental question presented by the regulatory definition of "environmental baseline" it is surprising that its application has not been reviewed by the Circuit Courts of Appeal. There is no dispute, however, that the Eighth Circuit decided an issue of first impression. *Compare American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175, 85 S.Ct. 300, 302 (1964) ("The question being an important one of first impression under the [Federal

statute], we granted certiorari. 376 U.S. 942, 84 S.Ct. 798"). Indeed, the Federal parties and American Rivers roundly criticized NPPD throughout this litigation for being unable to cite any precedent concerning an appropriate interpretation of the environmental baseline, and those parties offered no such citation themselves.

The Country will benefit from this Court's resolution of the Question Presented, particularly because, as explained next, the two agencies tasked with implementing Section 7 of the ESA interpret the "environmental baseline" differently.

II. THE FEDERAL AGENCIES CHARGED WITH ADMINISTERING THE ENDANGERED SPECIES ACT ARE IMPLEMENTING THE LAW IN DIFFERENT WAYS.

Perhaps the most "compelling reason" supporting certiorari is that the two Federal agencies charged with implementing Section 7 of the ESA currently are applying the environmental baseline differently. On November 30, 2004, NOAA Fisheries issued a biological opinion for operation of the Federal Columbia River Power System. A copy of the biological opinion is available online at http://www.salmonrecovery.gov/R_biop_final.shtml (visited December 12, 2005). NOAA Fisheries' biological opinion at 1-9 explains:

> Where the proposed action is a continuation of a past action, as is the case for the operation of the [Federal Columbia River Power System], the analysis for this step is complicated, because the environmental baseline will necessarily include the effects of past actions taken to construct and operate the ongoing project. NOAA Fisheries

> must therefore distinguish the effects of the proposed future operation of the project from its past construction and operation.

As explained above, FWS and NOAA Fisheries jointly promulgated the interagency consultation regulations at 50 C.F.R. Part 402 and are responsible for the consistent interpretation of those regulations. In this case, FWS excluded past and present impacts of dam operations in the environmental baseline formulated for purposes of Section 7 consultation on the Missouri River. NOAA Fisheries, in contrast, has explained that such impacts are properly included in Section 7 consultations on the Columbia River.[7] This Court should intervene now to confirm the correct interpretation.

CONCLUSION

The Eighth Circuit Court of Appeals is the first Circuit Court of Appeals to decide how the environmental baseline should be applied in the context of Section 7(a)(2) of the Endangered Species Act. That decision will frame consultations in the Eighth Circuit and has the potential to impact Endangered Species Act consultations throughout the Nation. The Federal agencies lack a consistent

[7] The United States District Court for the District of Oregon held unlawful NOAA Fisheries' biological opinion. *Nat'l Wildlife Fed'n*, 2005 WL 1278878 (D. Or., May 26, 2005) (unreported). That decision has not been reviewed on the merits.

view of how the environmental baseline should be defined. NPPD respectfully submits that it is appropriate for this Court to clarify the matter before additional discord results in unnecessary costs to the Nation and its people.

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IN THE

Supreme Court of the United States

NEBRASKA PUBLIC POWER DISTRICT,
Cross-Petitioner,

v.

U.S. FISH & WILDLIFE SERVICE *et al.*,
Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

OPPOSITION OF ENVIRONMENTAL DEFENSE AND NATIONAL WILDLIFE FEDERATION TO THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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MARCH 20, 2006

RULE 29.6 STATEMENT, JURISDCTIONAL STATEMENT, STATEMENT OF ADDITIONAL PARTIES AND OPINIONS BELOW

This memorandum responds to Nebraska Public Power District's cross-petition to this Court for a writ of certiorari, based on the original petition for certiorari of Environmental Defense and National Wildlife Federation in Environmental Defense et al. v. U.S. Army Corps of Engineers, et al., No. – 05-631. Environmental Defense and National Wildlife Federation incorporate the rule 29.6 statement, jurisdictional statement, statement of additional parties and opinions below set forth in their petition for certiorari in that related case.

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INTRODUCTION

Alone among the Intervenor-Defendants, the Nebraska Public Power District (NPPD) has filed a conditional cross-petition for writ of *certiorari* challenging the Fish and Wildlife Service's (FWS) longstanding interpretation of its regulation for assessing the environmental effects of agency actions subject to § 7 of the Endangered Species Act. The FWS regulation, 50 CFR § 402.02, provides that an agency must compare the added effects of an action against an environmental baseline, which includes other ongoing and reasonably expected actions, but does not include the environmental effects of the action under review. By contrast, NPPD seeks to include in the environmental baseline the precise environmental effects of the action under review, in this case the discretionary actions of the U.S. Army Corps of Engineers regarding when and how much water to release from Missouri River dams. NPPD's approach is illogical and would destroy the very purpose of establishing a baseline. It would prevent FWS from even identifying, let alone regulating, the environmental effects of ongoing government activities because the harmful effects of the action would already be included in the baseline. Because FWS's approach is inherently rational, because the agency's consistent interpretation of its own regulation is entitled to great deference, and because there is no conflict among lower courts regarding this approach, *certiorari* is inappropriate.

REASONS NOT TO GRANT THE WRIT

1. NPPD's Interpretation of the Regulation Is Illogical.

As an initial matter, it is important to clarify what government actions are at issue in this case and what NPPD has not asked this Court to review. The actions subject to the

Endangered Species Act are the U.S. Army Corps of Engineers' ongoing dam- management decisions, over which the Corps maintains broad statutory discretion. These decisions involve the quantity and timing of water releases from the Missouri River's main-stem dams. In a series of biological opinions since 1990, shortly after the least tern and the pallid sturgeon were listed under the ESA, FWS found that the Corps' operating decisions for these dams have distinctly harmful effects in excess of those caused simply by the dams' existence. *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 242-44 (D.D.C. 2003) (App. 91a-98a).[1] The FWS further found that these additive effects jeopardize the least tern, the piping plover and the pallid sturgeon. *Id.* And it found that the Corps could avoid jeopardy through a combination of mitigation measures and relatively modest alterations in dam management, which the

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[1] The Biological Opinion under review in this case is an Amendment to the 2000 Biological Opinion issued in December 2003. But this amendment only replaced some portions of the 2000 Biological Opinion in that it was designed solely to address a new proposal for a Reasonable and Prudent Alternative ("RPA"). 2003 Amended BiOp J.A. IX:6629 ("The scope of this consultation is limited to specific alternative elements offered by the Corps for specific elements in the 2000 RPA."). The precise definition of the underlying Corps' action under review, as well as the environmental baseline, remain those set forth in the 2000 Biological Opinion ("Operation of the Missouri River Main Stem Reservoir System," J.A. XIII:9889 & J.A. XIII:9890-9915.) The District Court properly characterized the Corps' action that is subject to ESA review as "the effects of its Missouri River operations on endangered and threatened species." *In re: Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (D. Minn. 2004) (App. 31a). Thus, contrary to NPPD's suggestion in their Conditional Petition for Certiorari, the action under review is the entire operational system, and not merely the modest changes proposed by the Corps in the 2003 RPA.

Corps has found would still serve all project purposes, and in fact increase overall economic benefits. *Id.* (Env. Def. Petition for Certiorari, No. 05-631, App. 92a-94a); *see also* Environmental Defense Petition for Certiorari at 15 & n. 7. The 2003 Amended Biological Opinion at issue in this case was simply the latest in a string of options analyzing how the Corps could bring its ongoing dam-management decisions into compliance with the ESA. *See supra*, n. 1.

NPPD has not challenged the holding below that the NPPD's ongoing dam-management decisions of the U.S. Army Corps of Engineers are subject to section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) & 1538(a)(1), because the Corps has ongoing broad latitude in how it operates the dams. By statute, section 7(a)(2) applies to "any action authorized, funded, or carried out" by a federal agency, and requires the agency to "insure" that such action "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). To distinguish ongoing actions from wholly past actions, a FWS regulation clarifies that section 7 only applies to an action "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. The Eighth Circuit has held that the Corps has broad discretion in its operation of the Missouri River Dams, *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003). In other words, the mere fact that the Corps has operated the dams one way in the past does not require it to operate the dams the same way in the future any more than the mere fact that an agency has allowed one level of hunting in the past obligates it to allow the same level of hunting in the future. Accordingly, the Eighth Circuit held that section 7 applies to the Corps' ongoing dam-management decisions. *In Re Operation of the Missouri River System Litigation*, 421 F.3d 618, 630-31 (8th Cir. 2005) (App. 14a-15a).

The Eighth Circuit's holding is consistent with the unanimous view of other courts that ongoing dam-management decisions are subject to § 7 of the Endangered Species Act.[2] This precedent is also consistent with the more general view that ongoing agency actions, over which the agency retains discretionary control, remain subject to the ESA. *See, e.g., Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (enjoining continued pesticide registration where application of the registered pesticide is harming an endangered species). Moreover, this Court has long recognized that "Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 186 (1978) (emphasis added). Regardless of the merits – but presumably because of this consensus -- NPPD has not challenged the holding below that ongoing dam management is subject to the ESA.

Instead, NPPD has tried to challenge this holding through the back door by challenging FWS's interpretation of

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[2] See, e.g., *Aluminum Co. of Am. v. Administrator, Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999) (applying the ESA to consider the effect of continued operation of the Federal Columbia River Power System on threatened and endangered salmon species in the Columbia River Basin); *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003) (same); *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D. Or. 1994) *vacated as moot by adoption of a subsequent Biological Opinion*, 56 F.3d 1071 (9th Cir. 1995) (same); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) (applying ESA to water deliveries from dams), *vacated on other grounds*,355 F.3d 1215 (10th Cir. 2004); *Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998) (assessing impact of ongoing Colorado River dam operations on an endangered songbird).

its own regulations regarding the "environmental baseline." But NPPD's alternative interpretation is illogical.

The term "environmental baseline" appears solely in FWS's regulatory definition of the "effects of the action" under review for determining compliance with section 7 of the ESA. 50 C.F.R. § 402.02. The regulation requires FWS to evaluate government actions, including ongoing actions, in the context of the "environmental baseline," which includes:

> the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

Id. FWS has long clarified that the environmental baseline does "not include the effects of the action under review in the consultation." United States Fish & Wildlife Service & National Marine Fisheries Service, Final ESA Section 7 Consultation Handbook (March 1998), at 4-22 (emphasis added).

NPPD challenges this interpretation. It claims that FWS must include the effects of ongoing dam management in the environmental baseline even as FWS is attempting to analyze the specific environmental effects of ongoing dam management when added to this baseline. Although NPPD concedes that dam-management decisions are subject to the ESA, this interpretation would prevent the agency from ever finding that such decisions have any adverse environmental effects. Indeed, if the environmental baseline were included in the effects of an action under review, the action could not have any environmental effect at all by comparison with the baseline. Its very inclusion in the baseline would therefore

negate the purpose of the regulation, which is to determine the additive environmental effects of the action under review. Nothing in the FWS regulations requires such an illogical result.

FWS properly applied its regulation in this case. The agency rigorously distinguished the future environmental effects of continued dam-management operations from the existence of the dams themselves and the effects of past dam operations. FWS first used a "run-of-the-river" baseline in which the dams and physical channel modifications were assumed to be in place but they were not actively managed. The FWS also assessed the present status of the protected species, which reflected the effect of past operations. It then analyzed the discrete environmental effects on protected species of future, active dam management if dam management continued as the Corps was planning. *In re: Operation of Missouri River Litigation*, 421 F.3d 618, 632 (App. 18a). If, as NPPD argues, the environmental baseline assumed the continuation of the existing dam-operation system, NPPD Conditional Cross-Petition at 12, such operations would be exempt from the ESA. Because NPPD has not challenged the Court's holding that ongoing dam management is subject to section 7 of the ESA, this approach would be nonsensical. Instead, the only way to analyze the effects of these future operations is to compare them to an environmental baseline that does not already include them.

Nothing in the FWS regulations supports NPPD's suggestion that ongoing dam operations are subject to the ESA, but have no environmental effects. To the contrary, the regulation provides the "effects of the action" are the "effects of an action" that are "added to the environmental baseline," 42 C.F.R. § 402.02, which means the effects of the action cannot already be incorporated into the environmental baseline. Nor has NPPD contended that the FWS approach violates the statute.

A simple example reveals the illogic of NPPD's argument. Under NPPD's reasoning, an agency that had previously issued hunting licenses to kill bald eagles could continue to issue the same number of hunting licenses each year, notwithstanding declining populations, since the environmental baseline would include the annual take from this level of hunting. The agency could continue to allow the same level of hunting each year even if hunting was the primary reason the eagle became endangered in the first place, and even if the hunting would drive the animal to extinction. Such a theory cannot be squared with the statutory requirement in section 7 that agencies "insure" that their actions do not jeopardize the continued existence of a protected species. 16 U.S.C. § 1536(a)(2).

2. FWS' Interpretation of Its Own Regulations Is Owed Deference.

This case is also not appropriate for *certiorari* because it challenges an agency's longstanding interpretation of its own regulation. As this Court has long recognized, a Court will not override an agency's interpretation of its own regulation unless the challenged interpretation is "plainly erroneous or inconsistent with the regulation. " *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). FWS' interpretation of 50 CFR §402.2 is not "plainly erroneous" or "inconsistent." To the contrary, NPPD's interpretation is "inconsistent with the regulation," since it would undermine the whole purpose of establishing an environmental baseline separate from the environmental effects of the action under review.

3. The Lack of a Circuit Split Makes *Certiorari* Inappropriate.

NPPD concedes that there is no circuit conflict about the applicability of the ESA to ongoing agency actions, including dam management, over which agencies retain substantial discretion. Indeed, courts have consistently held that the ESA applies to ongoing agency actions. *See supra* note 2. Instead, NPPD suggests that *certiorari* is appropriate to address the "novel" question of whether an action under review should itself be factored into the environmental baseline. NPPD Conditional Cross Petition at 13. In general, this Court views the absence of a circuit split as a reason not to grant review. In this case, in particular, the argument is probably "novel" only because it is irrational, which makes it particularly inappropriate for review.

Moreover, contrary to NPPD's argument, NPPD Conditional Cross-Petition at 18-19, NOAA Fisheries Service (also known as the National Marine Fisheries Service), does not include the effects of ongoing dam operations in its determination of the environmental baseline. In fact, NOAA Fisheries and the FWS use the same 1998 joint Endangered Species Consultation Handbook, which explicitly provides, at 4-22, that an environmental baseline "does not include the effects of the action under review in the consultation." (http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm (visited Feb. 15, 2006). Accordingly, the NOAA Biological Opinion cited by NPPD similarly states that the baseline "does not include the effects of the action under review." NOAA Fisheries Biological Opinion for Operation of the Federal Columbia River Power System at 5-1 (quoting ESA Consultation Handbook). Although that biological opinion used a complicated and somewhat different way to define the dam operations under review, it still defined the agency action to include the effects

of ongoing, discretionary dam operations, and therefore did not include those effects in the baseline.[3]

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[3] In that biological opinion, the NOAA Fisheries Service attempted to distinguish what it called discretionary dam operations from non-discretionary dam operations, and subjected to review only the "discretionary" dam operations. The non-discretionary dam operations were therefore included in the baseline because they were not part of the government actions subject to review. Even so, that baseline did not grandfather in all previous dam management but only a hypothetical non-discretionary dam management. See discussion in *National Wildlife Federation v. National Marine Fisheries Service*, 2005 Lexis 16345, *43 (D. Or. 2005). In this case, NPPD has not challenged in this Court that all ongoing dam operations are subject to Section 7 of the ESA. It logically and legally follows that the effects of those actions must be held outside the baseline.

NPPD quotes the NOAA biological opinion to the effect that that the "'environmental baseline will necessarily include the effects of past actions taken to construct and operate the ongoing project'." NPPD Conditional Cert Petition at 18 (quoting NOAA Fisheries BiOp). That is true: the effects on endangered species of past operations are part of the baseline, including, for example, diminished population levels that result in part from past operations. This means that in assessing the additive effect of future operations, FWS and NOAA must consider how they will impact a population level that is already low. But the effects of past operations are not the same as the effects of future operations. In other words, neither the FWS nor NOAA can assume as part of the baseline that harmful effects of past operations will continue because the Corps retains broad discretion over how to operate the dams.

CONCLUSION

For the reasons stated above, this Court should decline to grant *certiorari* on the question presented by NPPD.

Respectfully submitted,

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In the Supreme Court of the United States

NEBRASKA PUBLIC POWER DISTRICT,
CROSS-PETITIONER

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Fish and Wildlife Service reasonably determined that, for purposes of evaluating whether the Army Corps of Engineers' actions in managing the waters of the Missouri River Basin were likely to result in "jeopardy" of a listed species or "adverse modification" of its critical habitat under the Endangered Species Act, 16 U.S.C. 1536(a)(2), the "environmental baseline" of the Corps' operations was the operation of preexisting dams without flow controls.

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In the Supreme Court of the United States

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NEBRASKA PUBLIC POWER DISTRICT,
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UNITED STATES FISH AND WILDLIFE SERVICE,
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ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (05-631 Pet. App. 1a-28a) is reported at 421 F.3d 618. The memorandum and order of the district court (05-631 Pet. App. 29a-77a) is reported at 363 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari in No. 05-631, *Environmental Defense* v. *United States Army Corps of Engineers*, was filed on November 14, 2005. This conditional cross-petition for a writ of certio-

rari was filed on December 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the action that is the subject of the petition for a writ of certiorari in No. 05-631, several environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service (FWS) in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* In the claims that are the subject of this conditional cross-petition, cross-petitioner contended that FWS used an erroneous "environmental baseline" in evaluating the Corps' actions for purposes of the ESA. The district court granted summary judgment to the federal defendants on all of the above claims. 05-631 Pet. App. 29a-77a. The court of appeals affirmed in relevant part. *Id.* at 1a-28a.

The factual background of this case is generally set forth in the statement in the brief of the federal respondents in opposition to the petition for a writ of certiorari in No. 05-631. The following statement provides additional facts relevant to the conditional cross-petition.

1. The Endangered Species Act provides that a federal agency, in consultation with the responsible agency (here, the Fish and Wildlife Service), must ensure that any action it takes is not "likely to jeopardize the continued existence of any endangered species or threatened

species or result in the destruction or adverse modification of habitat of such species" which is designated as "critical." 16 U.S.C. 1536(a)(2). At the conclusion of its consultation, the responsible agency must produce a biological opinion in which it determines whether the agency action is likely to result in "jeopardy" or "adverse modification," and, if so, whether there are "reasonable and prudent alternatives" (RPAs) that the consulting agency could undertake to mitigate the impact of its action on the affected species. 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. 402.14.

The Corps' management of the Missouri River Basin affects several endangered or threatened species, three of which are at issue here: the pallid sturgeon, an endangered fish; the least tern, an endangered migratory bird; and the piping plover, a threatened migratory bird. In 2000, pursuant to the ESA, the Corps consulted with FWS concerning the effects of its Missouri River operations on the three species at issue. In 2000, FWS issued a biological opinion in which it concluded that the Corps' management plan was likely to jeopardize the continued existence of the three species. In issuing its opinion, FWS was required to evaluate "the effects of the action," which are defined by regulation as "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. 402.02. The "environmental baseline," in turn, is defined as "includ[ing] the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone * * * consultation [under 16 U.S.C.

1536], and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. 402.02. In preparing its opinion, FWS used as its environmental baseline a so-called "run-of-the-river" baseline, in which it assumed that the preexisting dams were operating, but without flow controls (*i.e.*, with the floodgates wide open). 05-631 Pet. App. 5a-8a, 18a; C.A. App. 10111-10115, 10117-10128.

Because FWS concluded in the 2000 biological opinion that the Corps' management plan was likely to jeopardize the continued existence of the three species, it identified in that opinion a reasonable and prudent alternative that the Corps could undertake to reduce the impact of its action on the species. Specifically, FWS proposed that the Corps increase river flows in the spring and decrease river flows in the summer, and also proposed a variety of other changes to the Corps' management plan. In 2003, however, because of the ongoing drought in the Missouri River Basin, the Corps concluded that it was unable to implement the flow changes mandated by the 2000 biological opinion. The Corps therefore reinitiated consultation with FWS pursuant to the ESA. As a result, FWS issued a supplemental biological opinion, using the same environmental baseline, in which it ratified the Corps' proposal to suspend the flow changes for the period from May 1 to August 15, 2003. 05-631 Pet. App. 7a.

2. In February 2003, various environmental groups, including petitioners in No. 05-631, filed suit against the federal respondents in the United States District Court for the District of Columbia, challenging FWS's issuance of the supplemental biological opinion. The district court granted a preliminary injunction, reasoning that the plaintiffs were likely to succeed on their claim, *inter*

alia, that FWS had failed sufficiently to explain why it had abandoned its earlier conclusion that flow changes were necessary to protect the species at issue. *American Rivers* v. *United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255-257, 262 (D.D.C. 2003).

Cross-petitioner operates power plants in Nebraska, some of which use water from the Missouri River for cooling purposes. Cross-petitioner intervened as a defendant in the *American Rivers* litigation, opposing the plaintiffs' efforts to challenge FWS's 2003 supplemental biological opinion (and therefore to resurrect the preexisting restrictions on summer river flows). Cross-petitioner also filed a cross-claim against the federal respondents, contending, *inter alia*, that the Flood Control Act of 1944 (FCA), ch. 665, 58 Stat. 887, required the Corps to operate the Missouri River Main Stem System primarily for flood control and navigation, and that the Corps therefore lacked the discretion to implement any alternative that restricted river flows. Answer and Proposed Cross-Claim 26.

The Judicial Panel on Multidistrict Litigation subsequently consolidated the *American Rivers* litigation with other litigation involving the management of the Missouri River Basin before a single court in the District of Minnesota for pretrial proceedings. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003).

3. In November 2003, the Corps again reinitiated consultation with FWS pursuant to the ESA, based on new information the Corps had developed since the 2000 biological opinion. The Corps proposed a new set of changes that did not include the flow changes specified in the 2000 opinion. Later in 2003, in light of the new information, FWS issued an amended biological opinion,

using the same environmental baseline, with a revised RPA. In the amended opinion, FWS again proposed that the Corps decrease summer river flows, but stated that it would reconsider that requirement if the Corps constructed new shallow-water habitat for the pallid sturgeon. In 2004, the Corps issued a revised version of its Master Manual, the plan governing its operation of the Main Stem System, in which it indicated that, under certain circumstances, it was prepared to reduce or eliminate support for downstream navigation. 05-631 Pet. App. 8a, 29a; C.A. App. 6108-6134, 6626-6922, 7241-7246, 8568-8569, 9764-9800; C.A. Supp. App. 1, 49-51.

In the wake of those developments, cross-petitioner amended its claims in the now-consolidated litigation. Cross-petitioner renewed its claim that the FCA imposed a non-discretionary duty on the Corps to operate the Main Stem System primarily for flood control and navigation (and therefore to maintain flow levels sufficient for navigation). Second Amended Cross-Claim 17-18. Cross-petitioner also alleged, *inter alia*, that FWS had erred in issuing its initial biological opinion in 2000 by "measur[ing] the effects of the Corps' proposed action against an improper environmental baseline." *Id.* at 19.

4. The district court granted the federal defendants' motion for summary judgment on cross-petitioners' claims. 05-631 Pet. App. 33a-37a, 39a, 49a-50a. With regard to the FCA claim, the court reasoned that "the FCA does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths" and concluded that "prioritization of river interests is discretionary." *Id.* at 35a. With regard to the claim concerning FWS's selection of the environmental baseline, the court noted that cross-petitioner's contention was that

"the environmental baseline used in the 2003 [amended opinion] is improper because it fails to include non-discretionary operations such as minimum flow levels." *Id.* at 49a. Because the court had concluded, with regard to cross-petitioner's FCA claim, that "the Corps does not have a non-discretionary duty to maintain minimum water flows," it likewise concluded that cross-petitioner's claim concerning the appropriate environmental baseline lacked merit. *Ibid.*

5. On appeal, cross-petitioner renewed its contentions that the Corps has a non-discretionary duty to support flood control and navigation over other uses of the Main Stem System and that, for that reason, FWS should have included existing operations in determining the environmental baseline. Cross-Pet. C.A. Br. 26-31; Cross-Pet. C.A. Reply Br. 6-16.

The court of appeals affirmed in relevant part. 05-631 Pet. App. 1a-28a. As is pertinent here, the court of appeals agreed with the district court that "the FCA imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests." *Id.* at 11a. And with regard to cross-petitioner's argument concerning FWS's selection of the environmental baseline, the court of appeals agreed with the district court that "this argument is essentially a different twist on the argument that the Corps has no discretion in operating the reservoir system." *Id.* at 18a. The court recognized that, "[i]f the FCA mandated that the Corps must manage the system to enable, for example, a barge of specific size riding a specific depth below the waterline to navigate the river between Sioux City and the Mississippi River at all times between April 1 and December 1, there would be some merit to including that non-discretionary condition in the environmental

baseline along with the permanent physical presence of the dams and channel modifications." *Id.* at 18a-19a. The court concluded, however, that "we cannot say that it was arbitrary and capricious for FWS not to include a specific operational profile in the environmental baseline." *Id.* at 19a.

ARGUMENT

Cross-petitioner contends (Cross-Pet. 13-19) that the court of appeals erred by rejecting its challenge to FWS's determination of the "environmental baseline" for purposes of preparing its biological opinions pursuant to ESA. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Even if the petition in No. 05-631 were to be granted, therefore, the conditional cross-petition should be denied.

1. The court of appeals rejected cross-petitioner's contention that the Corps has a non-discretionary duty to support flood control and navigation over other uses of the Main Stem System (and that FWS therefore should have included existing operations in determining the "environmental baseline" under 50 C.F.R. 402.02). 05-631 Pet. App. 18a-19a. As cross-petitioner concedes (Cross-Pet. 17), "[t]here is no dispute * * * that the Eighth Circuit decided an issue of first impression." Although cross-petitioner correctly notes (Cross-Pet. 14) that there are a large number of cases in which federal agencies are required to engage in consultation under 16 U.S.C. 1536 (and in which an agency such as FWS is therefore required to select an environmental baseline), cross-petitioner does not identify a single decision of another court of appeals in which FWS's selection of the environmental baseline has been questioned—much

less on a ground similar to that advanced by cross-petitioner below.

Instead, cross-petitioner merely contends (Cross-Pet. 18-19) that FWS defined the environmental baseline in this case differently than did the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries) in issuing a biological opinion concerning the Federal Columbia River Power System. Even assuming, however, that cross-petitioner's characterization of NOAA Fisheries' reasoning in its Columbia River biological opinion is correct, a federal district court, in an unpublished opinion, subsequently *rejected* that reasoning. See *National Wildlife Fed'n* v. *National Marine Fisheries Serv.*, No. 01-CV-640, 2005 WL 1278878, at *13 (D. Or. May 26, 2005). The government has appealed the decision in that case, and that appeal has not yet been briefed or argued in the Ninth Circuit. There is no reason for this Court to depart from its ordinary practice of awaiting a conflict in the circuits before granting review.

2. In any event, the court of appeals correctly rejected cross-petitioner's argument that FWS should have included existing operations in determining the "environmental baseline" under 50 C.F.R. 402.02. Specifically, the court of appeals correctly recognized that a necessary premise of cross-petitioner's argument is that the Corps had no discretion in its management of the Main Stem System. 05-631 Pet. App. 18a. And the court of appeals correctly rejected that premise, on the ground that (as it recognized in its earlier opinion in *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004)) the Corps in fact has a "good deal of discretion" in operating the Main Stem System. 05-631 Pet. App. 19a.

Cross-petitioner does not challenge that determination before this Court.[1] Instead, cross-petitioner recasts its argument, contending that FWS erred by failing to use a "baseline of existing operations" (regardless of whether it has a non-discretionary duty to support flood control and navigation over all other uses), and suggesting that, if existing operations were included in the environmental baseline, FWS would have been required to issue a biological opinion stating that the Corps' action was *not* likely to result in "jeopardy." Cross-Pet. 12.[2] Cross-petitioner, however, simply ignores the fact that, even assuming that existing operations were included in the environmental baseline, FWS would still be required to assess whether the proposed *future* action of the consulting agency—here, the Corps—would have the effect of jeopardizing the continued existence of an endangered or threatened species. See, *e.g.*, 16 U.S.C.

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[1] In No. 05-611, the States of North Dakota and South Dakota have filed their own petition for a writ of certiorari, challenging language in the court of appeals' opinion suggesting that the abandonment of navigation *altogether* would violate the FCA. That contention is quite different from, and far more limited than, the proposition that the Corps must *always* give priority to navigation and flood control over all other potential uses of Missouri River waters in its day-to-day operations of the Main Stem System.

[2] As cross-petitioner notes (Cross-Pet. 9), the court of appeals did not pass on this argument—perhaps because cross-petitioner did not discretely advance it until its reply brief. See Cross-Pet. C.A. Reply Br. 16-18; cf. Cross-Pet. 9 (citing reply brief for proposition that cross-petitioner had argued below that "FWS' environmental baseline was unlawful even assuming Congress vested the Corps with absolute discretion") (internal quotation marks omitted). See generally *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir.), cert. denied, 126 S. Ct. 356 (2005) ("Claims not raised in an initial brief are waived, and we do not generally consider issues raised for the first time on appeal in a reply brief.").

1536(a)(2). In this case, it is unclear whether FWS would have concluded that the Corps' proposed action was not likely to result in "jeopardy," even if certain effects of existing operations were taken into consideration in setting the environmental baseline. And, contrary to cross-petitioner's contention (Cross-Pet. 12 n.5), to the extent that ESA requires FWS to assess the impact of a *future* action by a federal agency, it would not have an impermissibly retroactive effect, regardless of the environmental baseline against which that action is measured. See *TVA* v. *Hill*, 437 U.S. 153, 186 n.32 (1978).

3. Finally, further review is unwarranted because the agency action challenged by cross-petitioner is of limited prospective importance. The Corps complied with FWS's 2003 amended opinion by constructing new shallow-water habitat for the pallid sturgeon. At least for the foreseeable future, therefore, the Corps will be able to operate the Main Stem System without being obligated under the ESA to decrease summer flows below the quantities required for downstream uses. Because cross-petitioner's avowed interest in this litigation is to prevent the Corps from decreasing downstream flows, see, *e.g.*, Answer and Proposed Cross-Claim 21, its continued interest is at best academic. Nor would its interest necessarily be more substantial if a writ of certiorari were granted in No. 05-631. Even if petitioners were ultimately to prevail on the merits of their claims, the result would be at most to vacate FWS's amended biological opinion and to remand, whereupon FWS could reach the same substantive result, albeit with more detailed reasoning or factual evidence. See 05-631 Fed. Resp. Br. in Opp. 20. Because resolution of the question presented would therefore have limited (if any) practical

impact on the Corps' management of the Missouri River Basin, and because cross-petitioner identifies no relevant conflict, further review is unwarranted.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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